

Muhammad Askari Vs. Rahmatullah and ors.

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Court : Allahabad

Decided On : Mar-15-1927

Reported in : AIR1927All548

Appellant : Muhammad Askari

Respondent : Rahmatullah and ors.

Judgement :

Sulaiman, J.

1. This is a plaintiff's appeal arising out of a suit for preemption. The claim was originally based both on an alleged custom as well as the Mahomedan law. The claim, so far as the custom is concerned, was later on given up. The plaintiff's case was that as the owner of Lal Kothi in Saharanpur situated in the same compound as Malik Hotel, the property sold, he was entitled to pre-empt the sale. The property was sold ultimately under a sale-deed, dated the 22nd of March 1923, ostensibly for Rs. 8,000. The plaintiff alleged that the real sale consideration was only Rs. 5,220. Various defences were raised on behalf of the vendees. They pleaded that the plaintiff had no right of pre-emption under the Mahomedan Law inasmuch as the defendants themselves were co-sharers in the mahal in which the property was situated and were on equal footing with the plaintiff. They further pleaded that the property had in fact been sold on the 18th of March 1923 at a public auction and the plaintiff having had full knowledge of it had refused to

purchase the property. It was also pleaded that no proper demands, as required by the Mahomedan Law, were made by the plaintiff and the suit was, therefore, not maintainable. The defendants stated that the true consideration was Rs. 8,000 as entered in the sale-deed.

2. The learned Subordinate Judge has found that the plaintiff has a right of pre-emption as against the vendees. He has further found that the true sale consideration was Rs. 5,220 and not Rs. 8,000 as entered in the sale-deed. But he has held that the sale took place under a public auction on the 18th of March 1923 and that the plaintiff did not offer any bids. He has also found that no demands were made at all and that in any case inasmuch as the second demand was made only to one of the vendees, it was not a proper and valid demand. The plaintiff has come up in appeal and the defendants have filed a cross-objection as to costs. The defendants have admitted the finding of the Court below that the real sale consideration was only Rs. 5,220 and not Rs. 8,000. It must, therefore, be accepted that the consideration entered in the sale-deed was inflated, (The judgment then considered the evidence and proceeded.) We therefore, find it impossible to hold that the auction sale actually took place in the presence of the plaintiff and that he failed to make any bid.

3. The claim being under the Mahomedan Law, the mere fact of a previous notice to the plaintiff that the property was going to be sold on the 18th of March 1923 cannot operate as an estoppel or deprive him of his right to claim pre-emption after the sale has actually taken place. Had he been actually present at the time and not made the talabs there and then, the position might have been different. As regards the question whether the plaintiff did in fact make the demands, there are certain circumstances to which the learned Subordinate Judge has not attached due weight. (The judgment then further discussed the evidence and found that the demands were made and all the formalities were observed.) The last point urged is that the demand made to only one of the three vendees was not sufficient. According to the defendants' evidence the bid was made by Rahmat Ullah alone and it was he who made the cash payment. The sale deed, however, is in favour of Rahmat Ullah and his two brothers, but there is no specification of their shares though one may, in the absence of any evidence to the contrary, presume that

they acquired the property in equal shares. In fact Rahmat Ullah in his deposition stated that his two brothers and he purchased the kothi in dispute in equal shares. It has not been suggested on behalf of the plaintiff that he made any second demand from the vendor, nor is it suggested that he made his second demand in the presence of the property sold. The plaintiff relies solely on the second demand having been made to Rahmat Ullah alone.

4. In the case of Gunpat Jha v. Anund Singh Das [1848] S. D. A. Lower Provinces 72 the making of Talab-i-ishtishhad with the affirmation by witnesses in the presence of one out of the several sellers was held to be a claim conformable to the Mahomedan Law In the case of Brij Beharee v. Durbari Lal [1850] S. D. A. (Bengal) 585 three learned Judges of the Sudder Dewanny Adalat held that it was not necessary for the plaintiffs to prove more than that they had duly preferred their claim to one or other of the joint purchasers, or the joint sellers. No authority for this view is to be found in the judgments. The learned Judges apparently thought that the word 'seller' or 'vendee' used in the singular in Mahomedan Law books meant any one of the sellers or the purchasers.

5. On the other hand, in the case of Aliman Begam v. Ali Husain : AIR1928 All355 , it was held that the singular words, 'vendor' and 'vendee' included the plural also; and that, therefore, if the demand was made neither in the presence of the vendor nor on the property sought to be pre-empted, but in the presence of the vendees, then in case there were more than one vendee, the demand should be made in the presence of all. This last-mentioned case is a clear authority for the view that if the second demand has been made to only one of the several vendees, the plaintiff cannot get the whole property. The further question whether the pre-emptor can get a proportionate share of property from the vendee to whom he did make the demand was not considered by the Bench. As the case was dismissed summarily under Order 41, Rule 11 and the argument is not reported, it is not clear whether this aspect of the question was pressed before the Bench or not.

6. The rule governing interpretation of statutes, namely, that the singular includes the plural, cannot be pushed to its extreme limit in the Mahomedan law, as that would necessitate the making of the second demand in the presence of each of

several properties sold, though by one transaction and to one vendee.

7. It is remarkable that in none of the leading books on Mahomedan Law, for example, Fatawa Alamgiri, Hedaya, Fatawa Kazi Khan, Durrul Mukhtar, Sharah Waqaya, Aini, and Mabsut of Saraskhi, is to be found any clear passage expressly stating whether more than one second demand is or is not necessary in the case of several vendees. The only reason for such omission seems to be that the result is supposed to follow logically from the view, of the Mahomedan jurists that in the case of a sale to several vendees there is a discrimination of their interest from the very beginning, that is to say, though the sale is effected by one transaction and only one price may be mentioned, it is supposed to be really distinct and separate so far as each vendee is concerned. The principle on which the Mahomedan jurists proceed is that a pre-emptor may object to the introduction of a particular vendee though he may not like to object to another co-vendee. On this ground they allow the pre-emptor to pre-empt the share of one of the several vendees leaving out those of the rest. Their reasoning is that, unlike the case where a purchase is made from several vendors, the integrity of which cannot be allowed to be broken up, one vendee suffers no loss if his share alone is pre-empted and the shares of the other vendees are not pre-empted. In their opinion this does not amount to a splitting up of any transaction inasmuch as they regard each vendee as if he entered into a separate transaction. It follows that if the pre-emptor intends to pre-empt the share of one vendee only he may make the demand to him alone, but if he wishes to pre-empt the shares of all the vendees he must make the demand to all of them, as their transactions are different. It is to avoid the inconvenience of making demands to several vendees or to several sellers, especially when some of them may intentionally keep out of the way, that provision has been made for the making of the demand in front of the property sold. To avoid difficulties of the kind which has arisen in this case, the easiest course for the pre-emptor is to make the second demand in front of the property.

8. There is a consensus of opinion that a pre-emptor can pre-empt the share of one of several purchasers and there is abundant authority in support of it. In the Hedaya, Vol. 3, Book 38, Ch. 4, Section 3, it is stated:

If five persons purchase a house from one man, the Shafee may take the proportion of anyone of them. If, on the contrary, one man purchase a house from five persons, the Shafee may either take or relinquish the whole, but is not entitled to take any particular share or proportion. The difference between these two cases is that if, in the latter instance, the Shafee were allowed to claim a part, it would occasion a discrimination in the bargain to the purchaser and be productive of very great inconvenience to him; whereas, in the former instance, the Shafee being merely the substitute of one of the five purchasers, no discrimination in the bargain is occasioned. There is no difference in the law in either of these cases, whether in making the purchase, a certain proportion of the price had been in general terms agreed upon for the whole; for the law is grounded only upon the discrimination in the bargain: Hamilton's Transaction of Hedaya, 2nd Edition, p. 567.

9. Similarly in Fatawa Alamgiri, Vol. 4, Ch. 4, it is stated:

If two persons buy a house from a third person then according to the general consensus of opinion the pre-emptor has the right to take the share of one of the purchasers, whether before or after possession, for the bargain has been separate from the very beginning and the taking of a part is no division of it, and it is the same, whether before or after possession and whether half the price is mentioned for each or one price is mentioned for both: incorporated almost verbatim by Baillie in his Digest of Muhammedan Law; Second Edition, Vol. 1, p. 498.

10. Similarly the author of the Durrul Mukhtar quotes the text of Tanwir-ul-Absar (on which it is a commentary) that:

if a number of persons purchase a property jointly and there is only one vendor there are as many takings by pre-emption as there are purchasers. Consequently the pre-emptor has the option of purchasing the share of some and giving up the rest, but not the reverse of this. The author adds that in the former case the pre-emptor steps into the place of one of the purchasers and thus there is no splitting of the bargain, and that it makes no difference whether it is before possession or after it, or if the price of each is fixed separately or jointly, because what is taken into consideration is the unity of the bargain and not of the consideration.' B. M. Deyal's Reprint p. 399.

11. Similar passages can be quoted from the other books referred to above, but it is not necessary to do so as they all lay down the same rule.

12. In view of these authorities it is clear that the second demand made by Muhammad Askari to Rahmat Ullah was a good and valid demand according to the Mahomedan Law so far as Rahmat Ullah's share was concerned, but it was not effective for purposes of claiming the shares of Rahmat Ullah's brothers. As the plaintiff had the option of pre-empting the share of any one of the vendees, it is clear that his omission to make the necessary demand from two of the vendees does not deprive him of his right to preempt the share of Rahmat Ullah. No other point is pressed.

13. We accordingly allow this appeal and, modifying the decree of the Court below, decree the plaintiff's claim for pre-emption of the one-third share belonging to Rahmat Ullah in the Malik Hotel on payment of one-third of the true sale consideration, that is, Rs. 1,740, within six weeks from this date. In the case of payment within the time allowed the plaintiff will have his costs in both Courts against Rahmat Ullah, In case of default his claim will stand dismissed against Rahmat Ullah with costs in both Courts. The plaintiff's claim for pre-emption of the two-third share belonging to Muhammad Yusuf and Muhammad Yaqub stands dismissed with costs in both Courts.